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THE EFFECT OF THE FEDERAL EMPLOYERS' LIABILITY ACT ON STATE STATUTES FORMERLY APPLIED TO CARRIERS IN INTERSTATE AND INTRASTATE BUSINESS.

It will be remembered that the former Federal Employers' Liability Act was declared unconstitutional, because it attempted to govern and control not only cars engaged in interstate commerce, but also those engaged in intrastate commerce.

It was thought in that case that the illegal part of the statute was not separable from the legal, and therefore that the entire legislation should fail.

By a like process of reasoning it would seem that, were a state now to enact a statute substantially the same in this regard, it would be held invalid legislation. Congress having withdrawn from the domain of the states this character of legislation, by covering the ground, inseparability vitiates in the same way, as where Congress was going beyond its power in the former employers' liability act.

But does the same result follow, where Congress by subsequently covering that part of such a state statute, kills operation of that statute as to that which would be deemed indivisible, had congressional action preceded the enactment of the state law?

The Texas Court of Civic Appeals says: "The state statute, even if construed as undertaking to cover cars in every service, interstate as well as intrastate was unquestionably valid until Congress had acted. When Congress does act, as it has done, the result is simply to limit the application of the state statute to cars in intrastate service." Freeman v. Swan, 143 S. W. 724.

This is all the opinion in the case says on this subject and it is very probable that its conclusion is correct. It opens up, however, an interesting inquiry as to why this is true and the general principle why it is true, if there is a general principle capable of formulation, ought to be stated.

Taking it then for granted, that incorporating an indivisible something in a state statute, which national law—the supreme law of the land—has already covered, and for that the state statute is void, because it cannot be discerned that the legislature would have enacted the law unless it were entirely valid, yet we think there is good reason for saying that Congress, subsequently covering part of the ground, changes the rule as to indivisibility.

The reason we think good is, that the state enacts such a law under notice that Congress may do this very thing and its legislation is in the form it is intended to be, in view of the power in Congress to limit the extent of its operation.

In other words, the state in legislating on such a subject tacitly says that what would appear indivisible generally is not so in this matter, because I am conceding at the outset that Congress may separate what I have joined, and, nevertheless, I wish my legislation to be in the form I have prescribed.

Still another reason that might be urged for this view is, that the state ought, and very probably is compelled for constitutional reasons, to legislate in exactly the way it does, as otherwise there would be unjust discrimination against carriers merely engaged in intrastate business. The permission given to the state to legislate as to carriers engaged in interstate commerce may involve the duty to exercise its authority in order not unjustly to discriminate.

But this duty is, nevertheless, under permissive power and this more strongly enforces the theory of the recognized right

in Congress to make separable that which otherwise is incapable of separability.

This principle does not militate against the thought that it may be perfectly manifest that a state legislature would not enact a statute in the form it has enacted it, so far as intrastate carriers are concerned, had Congress already covered the ground as to interstate carriers.

The state regards the situation and does its best under the circumstances, and it was not intended by the constitution that state law should be affected further than to recognize this situation. The presumption not to be disputed is that the state legislature takes this situation into account.

This is a very different matter from a legislature incorporating into a statute that which is beyond its reach. It asserts thereby that it has full right permanently to embrace both the legal and illegal parts. It violates overriding law in its very inception and presumptions in its favor disappear when the violation plainly appears.

Possibly we have admitted too much in saying, that, if Congress has already covered a portion of the ground that a state statute seeks wholly to cover, the same indivisibility rule applies, as where a statute is unconstitutional in part. It may be construction would not be so strict against divisibility, but, at all events, it seems to us, that the conclusion of the Texas court should be the law, as otherwise with the national government and the states rightfully acting in their appropriate spheres, there would result influences of one upon the other the constitution never intended.

It was not intended that national action should interfere with state autonomy any further than national regulation made this absolutely necessary. Indeed the states are supposed as much to aid in the regulation of interstate commerce in things they are left free to touch, as does Congress itself.

NOTES OF IMPORTANT DECISIONS

ATTORNEY AND CLIENT—ATTORNEY'S KNOWLEDGE OF FRAUD BINDING ON CLIENT.—The rule is well recognized that knowledge by or notice to an agent is knowledge by or notice to a principal, but this rule has its limitation as arising out of a transaction in which the agency is concerned. This may not be as wide a knowledge as the principal might have about a thing which would impugn his good faith. It is but a working rule as is illustrated by the exception to knowledge, even as limited in the way stated. This exception is that, if an agent is participating in a fraud, there is no presumption he has revealed the fraud to his principal.

By similarity of reasoning it may be presumed, that if an agent has previously participated in a fraud that finds a place in his subsequent representation of his principal, he does not reveal the fraud to his principal.

It is easy to advance from this point to presume that, if he is cognizant, before he began to represent his principal, of the perpetration of a fraud, which would prevent a principal from acting in good faith, this cognizance would not bind the principal. A principal is not thus limited in his choice of agents.

This theory the Kentucky Court of Appeals appears to have approved in the case of J. M. Robinson & Co. v. Bank of Pikesville, 142 S. W. 1065.

In this case it was charged, that the attorney of an execution creditor knew that certain money which had been placed to the credit of another by a bank, while as to the world generally subject to attachment or execution, yet was not subpect to this creditor's execution, because his attorney had participated in a fraud against the bank whereby this credit was obtained. The court thought that such participation had nothing to do with such creditor's execution, as the attorney was not then acting for the creditor in any way, and the subsequent fortuitous employment of the attorney could not operate to bar his, the creditor's, right to subject this fund to his execution. It is hard to see how any other result could be reasonably claimed.

TAXATION—ESTIMATING VALUE OF CORPORATE SHARES FOR PURPOSES OF TAXATION.—The Missouri statute provides as to taxing of shares of stock in corporations, that the owners of shares need not return them for taxation, but the corporation must and pay the tax for the owners, the tax to be

upon the true value of the shares "less the value of the real estate, if any, represented by such shares of stock," because the real estate owned by a corporation is returned by, and assessed for taxation to, the corporation.

Here it reasonably may be argued that the plain purpose is that there shall be no double taxation, and that state policy is, that in every case all taxable real estate shall be returned for taxes by the owner separately and a lien for taxes exist against the same.

It is easily conceived that the real estate of a corporation might be taxed in the true value only of shares without any deduction for any purpose. But, then, it is to be conceived that, if corporate stock were worth little because of its liabilities, merely taxing the true value of shares without any deduction would make it escape taxation, partly at least. And the same would be the case of a practically insolvent individual, if he could set off his liabilities against his real as well as his personal estate.

Nevertheless, the statute seems to declare very plainly that but one deduction is to be made from the true value of shares and that is the value of its real estate.

However, in State ex rel. v. Brinkop, 143 S. W. 444, decided by Supreme Court of Missouri, sitting en banc, it was unanimously held that premiums due on policies issued by an insurance company outside of Missouri on property also outside and a bank deposit subject to its check, kept by the company in a bank outside of the state and with no intent to avoid taxation in Missouri and taxable in the state where it is kept, should also be deducted from share values.

The court premises by saying that the maxim "mobilia sequuntur personam" is applied chiefly, if not exclusively, to the distribution of an intestate's estate," and that the Missouri statute also prescribes with reference to corporations that their property "shall be assessed and taxed as the property of individuals."

Against this, however, it is to be said, that insurance companies are specifically mentioned along with banks and joint stock associations doing a banking business as being allowed no deduction except for their real estate.

The court also argues at length about all assets of corporations belonging ultimately to the stockholders and that they, and not the corporations, really pay the tax. Then also it is said: "Double taxation has never been the policy of this state, as would be the case, if the stock and the property were both taxed. * * * To take into account in assessing the value of the shares of stock in this insurance company property owned by the corporation outside of this state would be equivalent in effect to requiring the shareholders to pay taxes on such property."

The court, however, does not challenge the right of the state to make real estate the only item of deduction from share value, and it is very hard to see how any other than the specifically named deduction can be allowed. We do not see how language could be any plainer.

Furthermore, even, if it may be conceded that it is a hardship for the premiums referred to not to be allowed to be deducted, yet this seems scarcely so as to the bank deposit. Practically the company had the same kind of an asset against the bank in another state that it had against the bank of its local deposits. It enjoys the benefit of local protection as well as to one as the other. Situs, indeed, of both credits is in Missouri.

If it is true, as ruled as to these deposits, an insurance company may do business where it pleases and, choosing a state where a lower rate of taxation is imposed, have its property there taxed, and all this under a claim that it is doing this not to escape taxation, it is however, escaping some taxes if the rate abroad is lower. We do not see, why individuals may not similarly escape taxation by having their bank accounts in another state. If they may, states may shape their legislation to attract foreign deposits.

NOTES OF RECENT DECISIONS IN THE BRITISH COURTS.

The Merchant Shipping Act exempts the owner of a British vessel from liability for damage to goods on board caused by fire provided such loss was not due to his actual fault or privity. The Section is so explicit that decisions on it have been few, so that a recent attempt to get pa t it and make the owner liable is interesting. The cargo in this case had been damaged by fire and its owners were able to establish that the ship had not been seaworthy. In argument it was agreed that there could only be three causes of fire: (1) accident; (2) negligence of the crew; (3) negligence of the owner. The Bill of Lading exempted the owner from negligence on the part of the crew, and it was contended for the

cargo owners that the fact that the owner had sent out an unseaworthy ship amounted to negligence by him and that therefore the fire was due to his actual fault. But it was held that the provision of the Act protected the owner even though there had been a breach by him of the warranty of seaworthiness.

We also note another point just decided in the Court of Session Scotland of interest to the shipping industry. A ship's cook while his ship was lying in Bo'ness Dock went ashore and in doing so had to cross the line of rails running through the docks. When he came to these he found them blocked with wagons and the dock gatekeeper told him to climb over them which he did. On his way back to the ship he again found the wagons on the line and attempted to cross by passing between two of the wagons, but it happened that shunting operations were on, the wagons were suddenly moved and he was crushed between the buffers. An action for damages by him against the railway company on the ground that warning should have been given that shunting was in progress was dismissed, the court laying down quite broadly that people who go to a dock are to be held as knowing that wagons standing on quay rails may be set in motion at any time without any special warning.

On this same subject of negligence a decision of the Irish courts may be referred to. The action, Boyle v. Ferguson, Ltd., 2 Ir. R. 489, was against a company owning motor cars, for a death caused by the negligence of the company's servant. The jury had found that the servant was acting within the scope of his employment at the time, and the question for the court was whether the following very special facts amounted to evidence to sustain that finding. The servant in question was the manager of the company's department for the sale of second-hand cars; he was driving with friends of his own, on a Saturday evening in one of these cars; he often took out second-hand cars without accounting to anyone; the petrol was charged to the defendant company; he said that his being on the road gave him better opportunities of doing business for the firm, but that this time he was driving for his own pleasure. The court held that the verdict was sustainable. The facts that he was at the time of the accident a servant and that part of his duty was to drive the car, were in the Chief Baron's view prima facie evidence that he was acting within the scope of his employment, sufficient to cast upon the masters the onus of rebutting this inference. Here the inference had not been rebutted and the evidence as to his uncontrolled discretion in the user of the car, as to the petrol charges and as to the drive giving him an opportunity of advertising and showing the car went to strengthen it. The court threw out a very important suggestion on which they expressly refrained from deciding but to which it is submitted that the law on this subject is tending. It is suggested that "scope of employment" must be or may be as extensive as the "authority" given to a servant; so that when a master authorizes a servant to use a car for the servant's own purposes as well as the master's every user of the car by the servant is deemed user as servant.

The Act of Parliament incorporating the Bristol Water Co., enjoined them to give a water supply for domestic use to all occupiers of private dwelling houses within the supply area. It was held, Bristol Guardians v. Bristol Water Co., 28 T. L. R. 23, that a workhouse was not a private dwelling house within the meaning of this Act and therefore the Bristol Guardians were not entitled to a supply of water for the domestic purposes of their workhouse.

In re Halls Charity, 28 T. L. R. 32, the question was between the trustees of a charity and the local justices charged with the upkeep of roads and bridges. Funds had been left by a testator for keeping in repair a bridge over the river Severn. As the result of two Acts of Parliament and by agreement between the Justices and the Severn Commissioners, a part of the bridge was made to open so as to allow traffic on the river to pass to and fro, and the justices were bound to keep in repair the opening part of the bridge. The contention was that the trust funds should be correspondingly relieved, but the broad rule was laid down that where a fund is devoted by a settler to the repair of a public bridge it remains applicable for that purpose notwithstanding that the legislature has cast the burden of such repairs on a public body.

Another point in the consideration of a will arose in Ryde v. Bristow, Law Reports, 1911, 2 Ch. 267. A testator bequeathed to each of his "indoor and outdoor servants the amount of one year's wages." A plain enough bequest one would think, but by a prior decision of the Court of Appeal in 1905 it was held that if a testator bequeathes to each of his servants "a year's wages" this applies only to

servants who are hired by the year. The decision was criticised at the time as a departure from the usual canon of construction that a will should be read in the sense a plain man would read it. That decision, however, has now been put aside and in the case mentioned it was held that all the indoor and outdoor servants whether hired or paid weekly, monthly or yearly came within the bequest.

DONALD MACKAY.

Glasgow, Scotland.

STRIKES—RIGHT AS TO AND CONDUCT OF.

Right to Organize and Strike Generally.—Questions for the consideration of the courts in respect to the rights of labor combinations or organizations and arising out of strikes and acts subsequent thereto, have of recent years continued to increase in number. Such a combination when formed for the purpose of controlling the rate of wages was, at common law as interpreted by the English decisions and a few of the earliest decisions in this country, regarded as a criminal conspiracy. The doctrine established by these cases did not, however, long control in this country, but the courts in interpreting the law applicable to such combinations gradually began to place them on a plane of legal equality with combinations of capital by holding that workmen had a legal right to combine for the purpose of bettering in any way their relations with their employers.[1] And in the courts of the United States at the present time the doctrine is generally recognized and accepted that labor, unless restrained by some contract obligation, may organize for its own protection and to further its own interests. The purpose of such organization may be to secure higher wages, or shorter hours, or to obtain a preference for members of the union to which the combining workmen may belong, or have reference to the efficiency of others who work with them. And the intent, motive, or reason is said to be immaterial as is also the fact that the combination may incidentally result in injury to others. In furtherance of their rights to organize for such purposes and in order to carry out the objects of the organization, workmen also have the right to declare that they will cease work unless their demands are complied with and in case they are not granted to strike in a peaceful manner.[2]

Thus Judge Parker, in giving the opinion of the New York Court of Appeals in National Protective Association v. Cumming,[3] refers to the dissenting opinion of Judge Vann in that case and says: "I shall assume that certain principles of law laid down in the opinion of Judge Vann are correct, namely: 'It is not the duty of one man to work for another, unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work, or refuse to work, at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from anyone. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor or improving their relations with their employers.

(1) Everett Waddy Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

(2) Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500; Wabash R. Co v. Hannahan (U. S. C. C.), 121 Fed. 563; Union Pac. R. Co. v. Ruef (U. S. C. C.), 120 Fed. 102; Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997; Meyer v. Journeymen Stonecutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492; National Protective Ass'n, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Mills v. United States Printing Co., 99 App. Div. (N. Y.) 605, 91 N. Y. Supp. 185; Butterick Pub. Co. v. Typographical Union, 50 Misc. R. (N. Y.) 1, 100 N. Y. Supp. 292.

(3) 170 N. Y. 315, 320, 63 N. E. 369, 88 Am. St. Rep. 648.

They have the right to strike; that is, to cease working in a body by pre-arrangement until a grievance is redressed, provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law.'" In this case it was determined that a labor union may refuse to permit its members to work with fellow servants who are members of a rival organization, may notify the employer to that effect and that a strike will be ordered unless such servants are discharged, where its action is based upon a proper motive, such as to secure only the employment of efficient and approved workmen, or to secure an exclusive preference of employment to its members on their own terms and conditions, provided that no force is employed and no unlawful act is committed. And if, under such circumstances the employees objected to are discharged, it is decided that neither they nor the organization of which they are members have a right of action against the union or its members.

Use of Violence by Strikers.—While the law recognizes the right of employees to strike, yet it does not countenance violence and requires that they shall proceed in a lawful and peaceful manner, both in instituting a strike and in their conduct and acts subsequent thereto. An employer is entitled to conduct a lawful business so long as he can obtain the workmen necessary to enable him to do so. Employees are likewise entitled to contract for employment with and to work for whomsoever they may choose upon such terms as may be mutually agreed upon. Therefore strikers must not use force or violence to prevent the employer from conducting his business or an employee from going back and forth from his work. Nor will acts causing destruction of, or injury to, the property of the employer be countenanced. Each person will be protected in the enjoyment of his personal and property rights and a court of equity will restrain strikers from doing any act of violence invading such rights of others.[4]

Right of Strikers to Force or Induce Employees to Stop Working.—In line with what we have just stated as to the right of a person to engage in the service of, and to work for, another, it follows that strikers cannot lawfully use force or threats to employees, who may have remained in the service of the employer or who may have taken their places or who are willing to, for the purpose of inducing or compelling them to quit their work, or to refrain from entering such employment.[5] In the absence, however, of any contract obligation the doctrine seems to be generally accepted that strikers are acting within their legal rights where they seek in a peaceable manner, by argument or persuasion, to induce such employees to so act.[6]

So in a leading case it is said: "The law having granted workmen the right to strike to secure better conditions from their employers grants them also the use of these means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective. This embraces the right to support their contest, by argument, persuasion and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, where exercised for a legitimate purpose and in a legitimate manner. So, in a contest between employees and employers, on the one hand to secure higher wages, and on the

(4) Reinecke Coal & M. Co. v. Wood (U. S. C. C.), 112 Fed. 477; Allis-Chalmers Co. v. Reliable Lodge (U. S. C. C.), 111 Fed. 264; Wilson v. Hey, 232 Ill. 389, 83 N. E. 928, affirming 128 Ill. App. 227; Everett Waddy Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792.

(5) Knudsen v. Penn (U. S. C. C.), 123 Fed. 636; Coeur d'Alene Consol. & M. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Murdock v. Walker, 152 Pa. St. 595, 25 Atl. 492, 34 Am. St. Rep. 678.

(6) Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477; Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72; Compare Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940.

other hand to resist it, arguments and persuasion to win support and co-operation from others are proper to either side, provided they are of a character to leave the persons solicited, feeling at liberty to comply or not as they please."[7]

And it is said in another case where union men had struck, that the employer and the union men have the right to enter into lawful competition for the support of the non-union men and to endeavor by peaceable argument or persuasion, to secure their co-operation, provided the persuasion is of such a character as to leave the person solicited feeling free to do as he pleases and he is not persuaded to do that which in him would be unlawful.[8]

This right, however, of strikers to endeavor by argument or persuasion to induce an employee to stop work for the employer against whom the strike is maintained, does not extend to the case of an employee who is under a contract of employment for a definite term and the purpose of the persuasion is to induce the breaking of the contract.[9]

And an employer who has a contract with his employees by which they agree not to join a labor union may maintain a bill in equity for an injunction to restrain persons with a knowledge of this fact from enticing such employees to break their contracts and to become members of a union.[10] And by statute in some states the enticing of an employee may also be unlawful.[11]

Right of Strikers as to Picketing.—A frequent result of a strike is what is known as picketing, that is, the patrolling by the strikers of the streets or approaches in front of and sometimes adjacent to the employer's place of business or their standing about such premises. The purposes of such action and the manner in which it is conducted are regarded as a general rule to be the determining factors upon the question of its lawfulness. Where the object is a lawful one and the picketing is conducted in a peaceful, orderly and lawful manner, there being no force, abusive language, threatening conduct or any form of intimidation used, the courts have generally decided that strikers are not acting in excess of their legal rights. So it is said that "peaceful picketing in theory is not only possible, but permissible and as long as it is confined strictly and in good faith to gaining information and to peaceful persuasion and argument, it is not forbidden by law."[12]

And in a leading case in which this question is considered, the doctrine is stated that strikers, when acting in a lawful manner, are entitled to resort to picketing for the purpose of securing notes as to the progress of the strike, and the names of persons employed and their place of residence.[13]

In a somewhat recent case in Illinois, however, it is decided that the picketing of employer's premises by strikers is itself an act of intimidation and an unwarrantable interference with the former's rights and that even though the pickets were not guilty of actual intimidation and threats, the employer is entitled to be protected from their annoyance. The court in this case referred to the doctrine that picketing is not necessarily unlawful if the pickets are peaceful and well behaved, but that if the watching and besetting of the workmen is carried to such an extent as to constitute an annoyance to them or their employer, it becomes unlawful and said that manifestly this is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful, but leaves the question to the indi-

(7) Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.), 788, per Hadley, J.

(8) Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500.

(9) Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49. See Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230.

(10) Flaccus v. Smith, 199 Pa. St. 128, 48 Atl. 854, 54 L. R. A. 640, 85 Am. St. Rep. 779.

(11) See Southern Ry. Co. v. Machinists' Local Union, 111 Fed. 49.

(12) Goldfield Consol. Mines Co. v. Goldfield Miners' Union (U. S. C. C.), 159 Fed. 500, per Farrington, J.

(13) Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788.

vidual notion or bias of the particular judge.[14]

The conclusion reached by the court in this case, is not, however, the generally accepted rule which is, as we have already stated, that picketing, when conducted for a lawful purpose and in an orderly and peaceful manner, is not unlawful.[15]

Strikers, however, in picketing, must keep within lawful bounds, both in respect to the object of the picketing and the methods which they pursue in exercising this right. They must not use violence either against employees who are working for, or against persons who are seeking to obtain work from, the employer against whom the strike is directed. Nor will they be permitted to use violence towards such employer or to inflict injury upon his property. And while they may use persuasion or argument in a peaceful way to obtain the co-operation of such employees, they must abstain from seeking to obtain such co-operation by the use of force, threats or intimidation and when they resort to such measures there is no doubt as to their having exceeded their rights. In such cases the aid of a court of equity by way of injunction may properly be invoked to restrain the commission of such acts.[16]

HOWARD C. JOYCE.

New York, N. Y.

(14) Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940.

(15) Goldfield Consol. Mines Co. v. Goldfield Miners' Union, (U. S. C. C.), 159 Fed. 500; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788; Fletcher Co. v. International Ass'n (N. J. Ch. 1903), 55 Atl. 1077; Searle Mfg. Co. v. Terry, 56 Misc. R. (N. Y.) 265, 106 N. Y. Supp. 438; Butterick Pub. Co. v. Typographical Union, 50 Misc. R. (N. Y.) 1, 100 N. Y. Supp. 292; Krebs v. Rosenstein, 31 Misc. R. (N. Y.) 661, 66 N. Y. Supp. 42, affirmed 56 App. Div. 619, 67 N. Y. Supp. 385; Everett Waddy Co. v. Richmond Typographical Union, 105 Va. 188, 53 S. E. 2.., 5 L. R. A. (N. S.) 792.

(16) Union Pac. R. Co. v. Ruef (U. S. C. C.), 120 Fed. 102; Allis-Chalmers Co. v. Reliable Lodge (U. S. C. C.), 111 Fed. 264; Southern Ry. Co. v. Machinists' Local Union (U. S. C. C.), 111 Fed. 49; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Jones v. Van Winkle Gin & M. Works, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 248; Franklin Union v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 100, 110 Am. St. Rep. 248; Herzog v. Fitzgerald, 74 App. Div. (N. Y.) 110, 74 N. Y. Supp. 366; Jones v. Maher, 125 N. Y. Supp. 1126, affirming 62 Misc. R. (N. Y.) 388, 116 N. Y. Supp. 180.

LIBEL AND SLANDER—SLANDER BY WIFE.

POLING et al. v. PICKENS et al.

Supreme Court of Appeals of West Virginia, Dec. 12, 1911.

73 S. E. 251.

A husband is liable for slander by his wife, whether present or not, notwithstanding the married woman's separate estate act.

BRANNON, J.: Matilda J. Poling and Lewis W. Poling, her husband, sued Emma V. Pickens and Robert Pickens, her husband, in the circuit court of Upshur county for slander of Matilda Poling by Emma Pickens, and there was a verdict for the plaintiffs and judgment thereon. We have a writ of error from that judgment.

(1) The plaintiffs in error assign it as error that the demurrer to the declaration, consisting of one count, was overruled. The declaration avers that the plaintiff Matilda J. Poling was a true and honest citizen, and had always well behaved herself, and until the wrong imputed by the defendant was always reputed, esteemed, and accepted by her neighbors and other good citizens to whom she was known to be a person of good name, fame and credit, and had obtained the good opinion of her neighbors and other good citizens to whom she was known; and that Emma V. Pickens, well knowing the premises, but contriving and maliciously to insult Matilda J. Poling and injure her good name, fame and credit, and to bring her into public scandal, infamy, and disgrace, and to cause it to be believed by her neighbors and other citizens that she had been guilty of teling falsehoods, and being otherwise a mean and unworthy citizen, did on the ——— June, 1907, in the county of Upshur, in the presence and hearing of Lewis W. Poling, her husband, and other good citizens, falsely and maliciously, and with the intention to insult said plaintiff, speak and publish of and concerning Matilda Poling the false, scandalous, malicious, defamatory, and insulting words, which the plaintiff avers to be in their usual construction and common acceptation construed as insults, and tend to violence and breach of the peace—that is to

say, "You" (meaning the plaintiff Matilda J. Poling) "go down town and swear another lie on me" (meaning that the said plaintiff Matilda J. Poling had sworn a lie on her, the said Emma V. Pickens)—by means of which the plaintiff was injured, etc. It is said this declaration is not good. It is said it was error to join the husband of Matilda Poling as a plaintiff. This point is not argued. It is well established that at common law the husband may join his wife in an action in tort by her.

(2) The frame of this declaration reads as if the action were for common-law slander injurious to the name, fame and reputation of Matilda Poling, and has words in it treating the words used as actionable under section 2, c. 103, Code, 1906, saying that "all words which from their usual construction and common acceptation are construed as insults, and tend to violence and breach of the peace shall be actionable. No demurrer shall preclude a jury from passing thereon." If I understand the point made against the declaration, it is that it joins common-law slander and statutory slander in the same count. I do not consider this mode of framing a declaration as very good pleading or artistic pleading. Statutory slander, if of a character to insult and produce anger and breach of the peace, gives action, though it may not impute legal crime, or injure fame or reputation, but merely insults, and therefore I would think that the declaration should merely state that the defendant spoke certain words of and concerning the plaintiff maliciously and unlawfully, with an averment that they were such words as from their usual construction and common acceptation are construed as insults and tend to violence and breach of peace. All allegations of the plaintiff's good character and of intent on the part of the defendant to defame it and allegation of injury thereto seem useless and out of place in actions for statutory slander; but eminent writers on pleadings, Minor, Barton, and Hogg give the forms used in this case. Their forms follow the precedents for common-law slander, with the addition of words suggested above, indicating that the action is one for statutory slander. These precedents are based on decisions holding that words of common-law slander, sufficient to sustain action, may still be treated as ground for action under this statute. Under that statute, words of a character to insult and tending to violence and breach of the peace, though not actionable at common law, are so under the statute; but words actionable at common law may also be made the subject of action under that statute if the declaration contain words, as this declaration plainly does, showing that the action is for statutory slander. Sweeney v. Baker, 13 W. Va., 158, point 5, 31 Am. Rep. 757; Payne v. Tancil, 98 Va. 262, 35 S. E. 725; Chaffin v. Lynch, 83 Va., 106, 1 S. E. 803. There it is said that in an action for statutory slander so much of the declaration as follows the common-law form of declaration for slander is mere matter of inducement, and unobjectionable. I would say it is surplusage. It is claimed that from the frame of the declaration above given we must say that this declaration joins both common-law and statutory slander, which is forbidden by decisions. Moseley v. Moss, 6 Grat. (Va.) 534; Hogan v. Wilmoth, 16 Grat. (Va.) 80; Payne v. Tancil, 98 Va. 262, 35 S. E. 725. But this declaration is not open to an objection of blending common-law and purely statutory slander. That rule against blending means where you put into the same count common-law slanderous words and words not such, but only insulting words, not actionable at common-law. We have just shown that a declaration going for insulting words under the statute may contain only words constituting common-law slander, and it cannot be in this case that there is a blending of the two kinds of slander. The most that can be said against this declaration is that it declares on the words as if actionable at common law. It contains only the slanderous words above given, no other words of different character of slander. How can it be said to unite two kinds of slander? In an action under the statute for common-law slander your declaration must show that the action is under the statute by averment to the effect that such words from their usual construction and common acceptation are construed as insults and tend to violence and breach of peace, or some averment of that import. Hogan v. Wilmoth, 16 Grat. (Va.) 80. This declaration does so, thus showing that the action is under the statute.

There is another reason against the demurrer. For this reason we need not have considered the demurrer. As stated above this declaration declares on its face that it goes for statutory slander. For that reason we must consider it such. But there is another reason requiring us to consider it so. It does not allege that Matilda Poling was sworn when she made the alleged false statement, or that it was made in a judicial proceeding, or that it was material. As stated in the opinion at

its opening in Brooks v. Calloway, 12 Leigh (Va.) 470, it is therefore not a good declaration for common-law slander. Hogan v. Wilmoth, 16 Grat. (Va.) 80. The declaration therefore is to be viewed as one under the statute. This being so, the statute prohibits a demurrer from preventing a jury to pass on the words spoken. This statute is really for insulting words hurting the feelings, causing anger and violence and breach of the peace. No demurrer lies to this declaration, as would be the case if it were for common-law slander only, without showing that it is filed under the statute, or if it united two kinds of slander in one count. Whether the words spoken are an insult under the statute is to be left to the jury.

(3) Another question. Judgment was rendered against Emma Pickens and her husband for words spoken by the wife. The rule of the common law is that the husband is liable for slander by the wife. It is contended that this is no longer in our time the law, owing to the acts providing for the separate estate of the wife and the rights to sue and be sued and to contract. The authorities conflict on this question, but preponderance of authorities is that the rule of the common law yet prevails. In obiter expressions in Gill v. State, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and Withrow v. Smithson, 37 W. Va. 761, 17 S. E. 316, 19 L. R. A. 762. I condemn this rule, but held it yet prevailing in this state. These dicta were given force of law in Kellar v. James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003, in which case Judge Poffenbarger carefully discussed the question. We are asked to reconsider the matter. We decline to rediscuss it. The authorities are given in those cases. I cite the case of Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160, holding the common-law rule still in force, notwithstanding the married women's act. An elaborate note to that case condemns the rule, but admits it to be law. I refer also to volume 9 p. 1225, of that late valuable work, Am. & Eng. Ann. Cas. where we find a full note of cases in many states holding that the old odious rule of the common law making the husband liable for the torts of the wife still prevails, and that action therefore must be brought against both, and judgment rendered against both. In 14 L. R. A. (N. S.) our case of Kellar v. James is elaborately annotated, giving diverse authorities. Our Legislature, in my own opinion, should abrogate the rule that the husband is liable for independent torts of the wife. I have no reference in what is said above to torts by a wife as to her separate property.

We affirm the judgment.

NOTE.—*Repeal or Not by Implication of Common Law of Husband's Liability for Torts of the Wife.*—There are a number of cases which hold that the husband is not liable for the wife's torts arising in connection with her separate property and there are cases *contra* on this subject. The former have, we think, better reason than those which hold that there is no liability at all purely because of woman's changed condition under married women statutes. Separate estate cases, however, are not considered in this note.

In Taylor v. Pullen, *supra*, it is said: "While it is true that one of the supposed reasons for the rule which required a husband to be joined with his wife in an action for her torts has ceased because he no longer acquires her property by virtue of the marriage in this state, all lawyers must admit that, so far, no writer or court has as yet furnished satisfactorily all the reasons which may have influenced the adoption of the rule at common law, and until they are produced, certainly the courts cannot declare that all the reasons have ceased and thus abolish the rule by judicial decision."

This is not a very forcible statement, for if there is a fundamental reason in statutory policy which makes the rule at common law so inconsistent that the statute would not have proper scope, the rule ought to go and it is not mere judicial decision that abolishes it, but judicial interpretation that says the statute does this. It makes no real difference whether all the reasons of the rule at common law have been explained or not—especially when it is said no one knows whether this has been done or not. We state, however, hereinafter what we think a better reason for holding there has been no repeal of the common law rule. This reason briefly is that enabling statutes do not need its repeal.

In Lane v. Bryant, 100 Ky. 138, 36 L. R. A. 709, 37 S. W. 584, the reasons for the opposite view to that taken by the principal case are stated as follows: "The wife, under this statute, may make contracts, sue and be sued, collect her rent and may sell and dispose of her property. While it may be and is the marital duty of both to aid each other in the support and maintenance of each and their children, the control and use of the wife's property by her is independent of the husband, nor subject to his control, and the familiar doctrine that the legal existence of the wife is merged in that of the husband no longer exists, and as on this rule is based the common law liability of the husband for the wife's torts, and even for her debts contracted before marriage, the reason for enforcing the doctrine is gone, and past adjudications on the subject will not be followed. The unity of person has been destroyed, and to say that it still exists, with the constant legislation of this state endeavoring to secure the wife in her person and property, and at last by the act of March, 1894, making the wife the equal of the husband in the control and use of her property, would be opposed to the plain legislative intent and result

in enforcing a doctrine that has neither wisdom nor justice in it."

One seeming difficulty about this reasoning is that it considers the question upon the same line, as if it were being asked whether the common law doctrine were suitable to our condition, a rule by which we determine what English law became our common law. It was at one time our common law and it would seem that it ought not to be repealed by implication, unless the implication is necessary. Besides, it is not absolutely true that "all unity of person has been destroyed," but only as to her separate property.

The Lane case quotes from Martin v. Robson, 65 Ill. 129, 16 Am. St. Rep. 578, as follows: "The legal supremacy of the husband is gone and the sceptre has departed from him. The wife has the legal right and aspires to battle with him in the contests of the forum; to outvie him in the healing art; to climb with him the steps of fame and share with him in every occupation. Her brains and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself." Perhaps; but this is a matter for the legislature, and all the aspiring, outvieing and climbing he talks about are features of individual cases and not the rule of womankind, and, if they might be, their doing these things repeals no law. All the things she could do under the statute was to have her separate estate, contract with reference to it, sue and be sued on such contracts, sue for injury to her person and for slander of her character and enjoy the fruits of her time and labor free from her husband's control. The legislature *specifies* and the court repeals existing law as to something not specified. In other words, it violates the *expressio unius* rule.

In Goken v. Dallugge, 72 Neb. 16, 99 N. W. 818, the court does not say "all unity of person has been destroyed," but: "The old common law idea of the oneness in the relation of husband and wife is fast disappearing. The identity of the woman is not lost in the husband; she is no longer under his dominion or control. On the contrary, in law, husband and wife are now considered as equals. * * * The reason for the law of entirety having ceased, with the reason, the law itself is no more."

Here appears somewhat more rankly, repeal by implication. Would a prior statute thus be pushed out of existence? We doubt it. If not, why should existing common law be thus disposed of?

In Cuimer v. Wilson, 13 Utah 145, 57 Am. St. Rep. 713, 44 Pac. 833, approved in the Goken case, it is said, the common law rule was based entirely on the marital right, and "the rule itself ought to cease, though the statute makes no mention of the husband's liability for the wife's torts or her rights to her own personal services."

The same objection we have stated may be here repeated and there might be further said the courts of this way of thinking iterate about the "rule at comon law," when this was not a "rule," but *law*, of our common law. English courts might better speak of it as a rule, but when it came to us and survived our declaration of independence it survived as a law giving a right of action. Legislatures, and not courts, should repeal law. Also it may be said former law is not repealed by implication, unless it interferes with the operation of later law. It cannot be claimed that this law interferes with the benefits given by enabling acts. On the contrary, it lays a burden on the exercise of them when no burden is prescribed.

Shuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009, like the other cases on this line, recites benefits of enabling acts, summarizing by saying: "The wife in Colorado is the wife under our statute and not the wife at common law and by our statute must her rights be determined; the common law affecting her rights having been swept away." All of which may be granted, but what of it, when the question is as to a husband's liability as to something the statute does not mention? Minnesota has an enabling statute and its legislature said expressly it should not exempt the husband from liability for torts committed by the wife. Morgan v. Kennedy, 62 Minn. 348. That body seemed aware of a judicial penchant in this direction. The Schuler opinion also says: "That many of the states still hold the husband liable jointly with the wife for torts committed by her without his presence must be conceded, and perhaps the greater number that have passed upon the question have so held, but in no one of the states so holding is the wife so completely emancipated from the dominion of her husband as in this state, and, as a rule, the courts find in their statutes some enactment showing that the legislature intended to not repeal the common law upon the subject." We doubt greatly whether there is support for this statement. But even were it so, it is not clear by what right the Colorado court finds a statute giving any benefit to a husband, when it merely professes to benefit the wife.

Two of the five judges sitting in the Schuler case dissent and the majority opinion is thus arraigned: "One unfamiliar with the conditions existing in Colorado might be led by the majority opinion to believe that nothing remained to the husband but the name. In this state, as elsewhere, the domicile of the husband is the domicile of the wife; the domestic services of the wife belong to the husband; except in extreme cases, he is entitled to the custody of the children; and, in the fullest sense of the word, he is the head of the family and the household, and exercises over the conduct of every member of the family the same influence and control which is exercised elsewhere, and in this respect the reason of the common law, here under discussion, exists as potentially to-day as it ever did, here or elsewhere." He then follows up this statement with a great array of cases, which he calls the "overwhelming weight of authority," against the majority opinion.

When we consider that in a number of states the legislature has abrogated the rule of the common law, we take it that courts elsewhere should understand that their aid in legislation is not needed upon this subject. When we also see that none of the cases pretend to declare that the abrogation of the rule either helps or hinders the full operation of the married women acts, we are led to wonder upon what theory of necessity courts should supply what the legisla-

ture has omitted. The policy of law is for the legislature. The only policy it announces is woman's emancipation, if we wish to call it that. Whatever of the common law interferes with that the court may say it disappears in repeal by implication, remembering too, that this doctrine is not much favored. C.

CORAM NON JUDICE.

INTERESTING ANECDOTES CONCERNING LORD BROUGHAM.

Lord Brougham's mother tells how when he was quite a child at their home at Brougham Hall he used to get up make-believe court of justice for the trial of a supposed prisoner, he himself acting as counsel, prosecuting the prisoner, examining the witnesses, summing up the case, and ending by passing sentence. Nothing could be more characteristic. Throughout his life Brougham loved to play many parts—the politician, the lawyer, the scientist, the social reformer, the slave emancipator, the orator, the educationist—and in each he must have the leading role. He loved to domineer, and this domineering propensity was responsible for much of the unpopularity which pursued him through life, even among his best friends. Creevey's nickname for him is "Beelzebub," sometimes the "Archfiend." Macaulay does not conceal his dislike. "Strange fellow," he exclaims; "his powers gone, his spite immortal—a dead nettle"! Even the genial Sydney Smith found him a severe trial. "There goes a carriage," said the witty canon as Brougham drove past, "with a B. outside and a wasp inside!" His restlessness, his aggressiveness, his spirit of intrigue, his jealousy, seems to have estranged them all.

But this wappishness of temperament must not blind us to the solid and splendid services which Brougham, as a public man, rendered to the cause of education and reform—political, social, and legal. With all his faults he was emphatically a great man; and it is not too much to say that to his enlightened views and tremendous driving power we owe most of what is best in our modern progress.

Brougham's mother was a niece of the Scotch historian Robertson, and this family connection determined Brougham's father to quit Brougham Hall, his ancestral residence in Westmoreland, and take up his residence in Edinburgh. He preferred the education of the High School there for his sons to that of Eton or Westminster as they then were. There is a very characteristic story told by Lord Cockburn of young Brougham, while the two were at school together, illustrating his irrepressibleness even at that age.

"Brougham," he says, "made his first public explosion while at Fraser's class. He dared to differ from Fraser, a hot but good-natured old fellow, on some small bit of Latinity. The master, like other men in power, maintained his own infallibility, punished the rebel, and flattered himself that the affair was over. But Brougham reappeared next day, loaded with books, returned to the charge before the whole class, and compelled honest Luke to acknowledge that he had been wrong. This made Brougham famous throughout the whole school. I remember as well as if it had been yesterday having had him pointed out to me as 'the fellow who had beat the master.' It was then that I first saw him."

The society of Edinburgh at this period when Brougham was beginning life was particularly delightful. The city was rich in talent, full of men distinguished in literature, science, and philosophy, among them—to name only a few—Walter Scott, Playfair, Dugald Stewart, Lord Monboddo, Jeffrey, Horner, Brown, Murray, Henry Erskine. The war with France kept the British from the Continent and Edinburgh became a favorite resort for residence and education. Sydney Smith—then a young parson with a pupil in charge—was one of those who thus put into the port of Edinburgh. Society, he says, was upon the most easy and agreeable footing. The Scotch were neither rich nor ashamed of being poor, and there was not the same struggle for display which so spoils the charm of London society. Few days passed without friends meeting either in each other's houses or in what were then very common—oyster cellars—where the most delightful little suppers used to be given in which every subject was discussed with a freedom impossible in large societies, and with a candor only found where men fight for truth and not for victory. Not the least attractive part of Edinburgh society were the old Scotch gentlewomen of the period—a delightful set—strong-headed, warm-hearted, high-spirited, who dressed and spoke and did exactly as they chose. Brougham's grandmother was one of these, and to her he used to say he owed everything. Of course, this society—like that of every epoch—had its failings, graphically described in Lord Cockburn's Memorials of My Time. To drink and swear were considered the marks of a gentleman, and tried by this test, nobody who had not seen them could be made to believe—as Lord Cockburn remarks—how many gentlemen there were. Nothing was more common, for instance, than for gentlemen, who had dined with the ladies and meant to rejoin them, to get drunk—a state of things due largely to the fashion of "Toasts" and "Sentiments." Who was likely to remain sober to the end when he had to begin by drinking separately the health of everybody else round the table? And this was only coquetting with the bottle! Ladies, too, were very tolerant of masculine failings—witness the young Scotch lady, who, in reproving her brother for swearing, admitted that "certainly swearing was a great set off to conversation!"

Into this life—legal, literary, social, and convivial—young Henry Brougham—who as Dr. Robertson's great-nephew knew everybody—threw himself with characteristic energy and zest. He wrote papers on "Optics" for the Royal Society. He declaimed at meetings of the

"Speculative Society" with equal eloquence whether he had an audience of six or sixty. He could take his three bottles at a sitting, and, as Sir Hildebrand in Bob Roy expressed it, be "neither sick nor sorry" the next morning. If a frolic was afoot in the way of wrenching off brass knockers or carrying away shop signs, Brougham was the ringleader. At twenty-two he was admitted as an advocate of the Scotch Bar, and went the Southern Circuit—trying to get practice by defending poor prisoners for nothing.

His resourcefulness in this way inspires admiration and deserved success if it did not meet with it. The first trial was for sheep-stealing, and Brougham objected to the relevancy of the libel (indictment) on the ground that it did not specify the sex of the animal stolen—tup, ewe, or wether—which he contended was necessary for the purpose of informing the panel (prisoner) exactly of the offense with which he was charged. Every tup was a sheep, but every sheep was not a tup, and so of ewes and wethers. Could you indict a man for stealing an ox and convict him on evidence that he stole a cow? Or for stealing a goose and show that he stole a gander? In the next case, which was for stealing a pair of boots, the articles when produced were "half-boots," and Brougham contended that "half-boots," were not boots any more than a half guinea is a guinea. But here the judge, Lord Eskgrove, discovered an unwonted sagacity by pointing out that a "half-boot is not the same as half a boot, but nomen generale. The moon is always the moon, though sometimes she is the half-moon." This poor old Scotch judge—one of the oddities of the Bench—was almost driven demented by Brougham's volubility and acuteness. He liked to dawdle on—Dogberry fashion—with prisoners and juries in his own way, and just when he was looking forward to the pleasure of doing so, lo! his enemy would appear in court—tall, cool, resolute, remorseless. "I declare," said the old judge, "that that man Broom, or Brougham, is the torment of my life." He revenged himself by sneering at Brougham's eloquence, and calling him "The Harangue." "Well, gentlemen, what did the Harangue say next? Why it was this" (misstating it), "but here, gentlemen, the Harangue was most plainly wrong and not intelligible."—Law Times.

CORRESPONDENCE.

Editor Central Law Journal:

I have read, with interest, the able and timely article of Judge Tolbert in the issue of the Central Law Journal of January 26, 1912, on reform and procedure in Oklahoma. There is one matter mentioned in the article, however, in which the judge is in error. He states that under the Statute of our State a subpoena of a witness and all grand and petit jurors are not allowed to be made over the telephone or by telegraph. Section One and Two of Chapter 51 of the Session Laws of 1910 of this State, provides as follows:

VENIRES FOR JURORS. Section 1. That the service of the venire for the grand and petit jurors for the District and Superior Courts and the petit jurors for the County Court, of this State shall be served by the sheriff notifying the several persons named in the venires to be in attendance on the court at the time and place mentioned in the venire; Provided, such notice may be given by said sheriff orally in person, over the telephone, by telegraph, or by registered or ordinary mail, in the discretion of the judge of the court ordering the juries.

SUBPOENAS FOR WITNESSES. Section 2. All subpoenas in civil and criminal actions in the district, superior, county and justice courts of this state, shall be served by the peace officer, or other person making the service, notifying the persons named in the subpoenas to be in attendance upon the court at the time and place mentioned in the subpoenas to testify as a witness in the action therein described; Provided, such notice may be given orally in person, by telegraph or registered mail, or by delivering to each witness in person a true copy of the subpoena, at the option of the party for whom the subpoena is issued; and Provided, further, that when a witness is once served, as provided by law, he shall attend the court from day to day and from term to term until finally discharged by the court."

It is noted that a witness may be subpoenaed by telegraph or by registered mail, or by delivering to the witness a copy of the subpoena. I doubt the wisdom of permitting the service of subpoenas on witnesses over the telephone on account of the errors that might be occasioned in making service.

Yours respectfully,

C. C. HATCHETT.

Durant, Okla.

HUMOR OF THE LAW.

A Kansas merchant who had just paid a fine because his vegetable display box was not six inches higher than the sidewalk, ventured the assertion that a man can't go from morning till night without breaking some Kansas law, no matter how careful he is. A hotel man thought he could; and a wager was made, and the next day was set for the test.

"I'll win that bet, all right," said the hotel man. "I'll stay in bed all day to-morrow."

And he did, until just before dark when an inspector came along and arrested him for not having a nine-foot sheet on his bed.

Farmer's Wife—I hear your son is making money out of his voice at the opera?

Byles—That's right, mum.

Farmer's Wife—Where did he learn singing?

Byles—Oh, 'e don't sing; 'e calls the carriages.

The Chicago woman was on the witness stand. "Are you married or unmarried?" thundered the counsel for the defense. "Unmarried, four times," replied the witness, unblushingly. —Philadelphia Record.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Acknowledgment**—Defectiveness.—A material provision of the statute expressly required to be stated in a certificate of acknowledgment to a deed cannot be wholly disregarded, and a deed thus acknowledged lawfully admitted to record.—Gross v. Rowley, 132 N. Y. Supp. 541.

2. **Animals**—Nominal Damages.—The destruction of a dog without justification entitles the owner to nominal damages at least.—Rowan v. Sussdorff, 132 N. Y. Supp. 550.

3. **Attachment**—Jurisdiction.—A court issuing a writ of attachment is without authority to compel a nonresident to appear and litigate his rights to the fund attached.—State ex rel. McIndoe v. Blair, Mo., 142 S. W. 326.

4. **Attorney and Client**—Disbarment.—The right to practice law is only a privilege, exercised by a license which may be revoked when the holder's misconduct makes him unfit to exercise the duties of his office.—Wernimont v. State, Ark., 142 S. W. 194.

5.——Term of Relationship.—Since an attorney's duty ordinarily ceases by the termination of the proceedings adversely to his client, his receipt of money thereafter to satisfy the judgment constitutes a new relation.—Emanuel v. Cooper, Ia., 133 N. W. 1064.

6. **Bankruptcy**—Assets of Bankrupt.—On the bankruptcy of a person who was in fact the sole owner of a business, although it was conducted in the name of himself and another as partners, the property and assets of such business passed to his trustee as his individual property.—In re Gibson, U. S. D. C., 191 Fed. 665.

7.——Composition.—A debt discharged in bankruptcy after acceptance of composition offer held discharged by operation of law, so as to support the debtor's promise to pay the balance of the debt.—Cohen v. Lachenmaier, Wis., 133 N. W. 1099.

8.——Jurisdiction.—A court of bankruptcy held to have jurisdiction to summarily determine the right of a mortgagee to the proceeds of the mortgaged property which were rightfully in the hands of the trustee.—In re Plymouth Elevator Co., U. S. D. C., 191 Fed. 633.

9.——Mortgage.—Where purchaser of personalty gives a purchase-money mortgage and is adjudged a bankrupt, and the property is sold by his trustee, the purchaser takes subject to the mortgage, unless the bankruptcy court orders a sale divested of liens.—Horkan v. Eason, Ga., 73 S. E. 352.

10.——State Courts.—The pendency of bankruptcy proceedings when attachment of a single creditor was begun in a state court precludes that court from proceeding to judgment.—Acme Harvester Co. v. Beekman Lumber Co., 32 Sup. Ct. Rep. 96.

11. **Banks and Banking**—Constructive Notice.—A bank has no constructive notice of fraudulent acts by an officer which he would not naturally disclose to it.—Real Estate Trust Co. of Philadelphia v. Washington, A. & Mt. V. Ry. Co., C. C. A., 191 Fed. 566.

12.——Negligence.—It is negligence for a collecting bank to transmit its checks directly to the bank or party by whom payments is to be made, with request that remittances be made therefor.—Pickett v. Thomas J. Baird Inv. Co., N. D., 133 N. W. 1026.

13.——Receivership.—The purchaser of drafts from a bank while it was insolvent and had no reason to expect that the drafts would be honored is entitled to preference to the extent of moneys turned over to the receiver of the bank.—Pickett v. Thomas J. Baird Inv. Co., N. D., 133 N. W. 1026.

14. **Bills and Notes**—Appearance of Paper.—Where a protest attached to a check by the drawer by pin only was detached by the payee leaving the check without appearance of mutilation and transferred to a bona fide holder, the drawer was liable notwithstanding the protest.—Southern Sand & Material Co. v. People's Savings Bank & Trust Co., Ark., 142 S. W. 178.

15.——Holder for Collection.—The holder of a note for collection may sue thereon in his own name, if the note is indorsed in blank by the payee.—Antelope County Bank v. Wright, Neb., 133 N. W. 1123.

16.——Pleading.—Where defendant pleads total failure of consideration of a note but proves at most a partial failure, refusal to submit the defense held not error.—Sibley & Davis v. Rodgers, Neb., 133 N. W. 1130.

17.——Stipulation for Fees.—A stipulation in a note for attorney's fees in the event of a suit thereon held not a mere contract for indemnity but to bind the maker to pay such at-

torney's fees, in the absence of plea and proof that the amount is unreasonable.—Beckman v. Scott, Tex., 142 S. W. 80.

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